

NTSB Order No. EA-3904

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 1st day of June, 1993

Respondent .

Docket SE-11328

¹ Attached is an excerpt from the hearing transcript containing the oral initial decision.

suspension from 60 days to 40 days. The order of suspension, which served as the complaint in this proceeding, alleged that on June 30, 1989, respondent acted as first officer of United Airlines Flight #286 (a Boeing 727) from Denver, Colorado, to Omaha, Nebraska. The order further alleged that, in spite of respondent's acknowledgement of an air traffic control (ATC) instruction to taxi into position and hold at Runway 35 Right, respondent departed from that runway without a takeoff clearance in violation of 14 C.F.R. 91.9, 91.75(b) and 91.87(h).² In affirming these violations, the law judge rejected respondent's defense that he justifiably relied on the captain's statement

² Section 91.75(b) [now § 91.123(b)] provided:

§ 91.75 Compliance with ATC clearances and instructions.

(b) Except in an emergency, no person may operate an aircraft contrary to an ATC instruction in an area in which air traffic control is exercised.

Section 91.87(h) [now § 91.129(i)] provided, in pertinent part:

§ 91.87 Operation at airports with operating control towers.

(h) **Clearances required.** No person may, at any airport with an operating control tower, operate an aircraft on a runway or taxiway, or takeoff or land an aircraft, unless an appropriate clearance is received from ATC.

Section 91.9 [now § 91.13(a)] provided:

§ 91.9 Careless or reckless operation.

No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.

that they were cleared to take off.

The facts of this case are not disputed. In preparation for departure from Stapleton International Airport in Denver, respondent's aircraft (United #286) was cleared by ATC to taxi into position and hold on Runway 35 Right. Respondent, who was handling ATC radio communications at the time, received and acknowledged this instruction while the captain taxied the aircraft into position on the runway and set the brakes. The captain then turned the controls over to respondent, who was to fly the airplane on this flight. Shortly thereafter, another aircraft (United #298) was cleared to take off from a parallel runway, 35 Left.

Respondent, who had continued to monitor ATC radio communications after assuming the controls,³ testified that he was uncertain whether the clearance for United #298 was for his flight (United #286) and asked the captain if their flight was cleared for takeoff. According to respondent,⁴ the captain stated that they were cleared for takeoff and respondent advanced the throttles and took off. The second officer, who was also monitoring ATC radio communications, testified that although he did not hear a takeoff clearance for their flight he believed they had been cleared based on the exchange between respondent

³ Although there was no testimony at the hearing as to whether respondent was wearing a headset or listening to a cockpit speaker, in his brief respondent states that all three pilots were listening to the ATC instructions over the cockpit speaker.

⁴ The captain did not testify at the hearing.

and the captain.

In fact, no takeoff clearance was issued for respondent's flight and the tape of ATC communications indicates that respondent's aircraft transmitted no acknowledgment of any takeoff clearance. (Exhibit A-1.) As a result of respondent's unauthorized takeoff, the controller was required to take immediate action to ensure that respondent's aircraft and two others maintained visual separation from each other in order to avoid a collision hazard.

On appeal, respondent concedes that he took off without an ATC clearance, but maintains that he should be absolved of any wrongdoing because he justifiably relied on the captain's statement that they were cleared for takeoff. In support of this reliance defense, respondent cites Administrator v. Coleman, 1 NTSB 229 (1968), Administrator v. Thomas, 3 NTSB 349 (1977), and Administrator v. Crawford, 5 NTSB 1000 (1986). The Administrator has filed a reply brief in which he argues that respondent's reliance was not reasonable and, accordingly, does not excuse his violation. For the reasons discussed below, we deny respondent's appeal and affirm the initial decision.⁵

A pilot cannot avoid responsibility for regulatory violations resulting from his reliance on a fellow crewmember's characterization of an ATC transmission unless that reliance is shown to be reasonable. The Board's evaluation of whether

⁵ Respondent's motion for oral argument is denied. The parties have briefed the issues adequately and we see no need for further arguments.

reliance is reasonable is conducted on a case-by-case basis. Administrator v. Leenerts, NTSB Order No. EA-2845 at 9 (1988). The circumstances of this case lead us to conclude that respondent's reliance was not reasonable.

Respondent's testimony indicates that when he heard the takeoff clearance for the other aircraft, he had some doubt that the clearance was for his aircraft: "I was uncertain as to who had received takeoff clearance and I wasn't sure whether or not it was our flight." (Tr. 54.)⁶ The fact that the captain did not read back or acknowledge the takeoff clearance should have confirmed respondent's suspicion that the clearance was not for them. Further, although he had the ability and opportunity to do so (Tr. 20-1, 62), respondent failed to seek ATC verification of the questioned clearance or even to consult with the third crewmember in the cockpit, the second officer, who admitted at the hearing that he had not heard a clearance for their aircraft to take off. (Tr. 64-5.)⁷ Indeed, an FAA air crew program

⁶ It should be noted that respondent's uncertainty as to the meaning of the ATC clearance in this case cannot be attributed to misleading terminology or procedures on the part of ATC. (See Administrator v. Frohmuth and Dworak, 13816 (1993), where we found the controller's sloppy handling of a transmission to be an "invitation to error" by the flight crew.) To the contrary, our review of the tape recording of ATC communications in this case reveals that the clearance for the other aircraft (United #298) to take off from the parallel runway (Runway 35 Left) was transmitted in a clear and unambiguous fashion.

⁷ The fact that the second officer in this case did not hear any takeoff clearance for this flight (see Tr. 64-5) distinguishes it from Administrator v. Leenerts, NTSB Order No. EA-2845 (1988) where our finding of reasonable reliance was based in part on the fact that all three pilots in the cockpit misheard the clearance in the same way.

manager with responsibility for United Airlines' 727 fleet testified that United's cockpit resource management training teaches pilots to be assertive in questioning the actions of captains and other cockpit crewmembers. (Tr. 16, 19-22.)

In view of 1) the unambiguity of the takeoff clearance for the other aircraft; 2) the lack of an acknowledgement from respondent's aircraft; and 3) respondent's failure to seek further verification of the questioned clearance, we agree with the law judge's conclusion that, under the circumstances of this case, respondent's reliance on the captain's statement was not reasonable (Tr. 89-90) and his violations cannot be excused.⁸ We recognize that the law judge also concluded, somewhat inconsistently, that respondent could "[count on] a certain amount of reliance" on the captain's statement (Tr. 91) and cited this as a factor in mitigation of sanction. Although the Administrator did not appeal from the reduction in sanction, we do not agree that a pilot's reliance can be a mitigating factor when it is not reasonable enough to rise to the level of a complete defense.

⁸ We also agree with the law judge that the deference by respondent, a former military pilot, to the captain's higher rank in the reserves (which respondent asserts influenced his decision to rely on the captain's statement) is irrelevant to our consideration of this case.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied;
2. The Administrator's order of suspension, as modified by the law judge's reduction of sanction, is affirmed; and
3. The 40-day suspension of respondent's airline transport pilot certificate shall commence 30 days after the service of this opinion and order.⁹

VOGT, Chairman, COUGHLIN, Vice Chairman, LAUBER, HART and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.

⁹ For the purpose of this opinion and order, respondent must physically surrender his certificate to an appropriate representative of the FAA pursuant to FAR §61.19(f).